No. 1422

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

COLUMBIA CANNING COMPANY (a Corporation) and R. A. LEONARD,

Appellants,

vs.

W. E. HAMPTON and J. P. NELSON,

Appellees.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE.

In the fall of 1904 appellants selected a certain spot on the navigable waters of Lynn Canal, Alaska, an arm of the sea, as a suitable place for the erection of a fish trap, and, on the upland abutting said waters, performed certain acts indicative of their intention to erect such a device. In May of 1905 they returned to the locus in quo for the purpose of effecting their said design, and found

there, in the navigable waters, eight piles in a row, ten feet apart, not connected by a web, not fishing nor capable of fishing. They proceeded to build their trap and completed the same and began fishing therewith. As completed, said trap would effectually "cork" a trap which, plaintiff alleges, he contemplated building.

On this state of facts, shown by the evidence and found by the Court, the latter entered its decree of mandatory injunction, ordering appellants to pull up their trap and abandon the premises; and the question underlying this appeal is substantially this, viz.: If a person drives eight piles in a row, ten feet apart, in navigable water of the United States, and does not connect them in any way, or fit them for fishing, and is not fishing therewith, and then leaves them to get more piles, and while he is gone another person comes in front of the said piles, sets up his pounds and stakes and begins fishing, is the first named person entitled to an injunction to restrain the second named person from fishing in front of him and to a command of the Court to the second party to pull out his piles, remove his netting and cease fishing?

Appellants are not charged with having violated any law, nor with having caused an obstruction to navigation, nor with having erected or maintained a nuisance or purpresture of any kind, but the suit is based and the injunction granted on the sole ground that appellee's rights have been invaded.

There is no law in Alaska, except the common law, conferring or regulating rights of fishery or determining the things necessary to be done in order to obtain priority of right.

The findings and conclusions are as follows (Record, p. 99):

FINDINGS OF FACT.

That some time in the fall of 1904 the defendant Leonard, on the part of the said defendants, went to the beach of Lynn Canal, a navigable arm of the North Pacific Ocean, at a point on St. Mary's Peninsula, District of Alaska, immediately in front of and abutting upon the following described upland, to-wit:

Commencing at corner No. 1, a spruce stake 5 inches square, set firmly in the ground, a mound of rock at high water mark on north shore of Lynn Canal, on westerly end of St. Mary's Point, marked corner No. 1 F. T. L.; thence running north 20 chains to corner No. 2, a spruce tree 6 inches in diameter, marked corner No. 2, F. T. L.; thence east 20 chains to corner No. 3, a spruce stake 5 feet long, 4 inches square, marked corner No. 3, F. T. L.; thence south 20 chains to corner No. 4, spruce tree 8 inches in diameter, standing on beach at high water mark, marked corner No. 4, F. T. L.; thence along the meander line of shore at high water mark, to place of beginning. And the said defendants did there and then on said beach abutting upon said described upland, post a notice of location of a fish trap location; and in addition to said notice said plaintiff caused to be set near the line of low tide three stakes, or small piles, which were at the time cut from the timber above the beach. These three piles or pieces of timber were not driven and were set so insecurely that they did not long withstand the action of the tide. The notice that was posted, nor any other notice of location of said fish trap, was ever recorded at any place. In fact, was not recorded at all. After setting the three piles the defendant left the place without doing more.

II.

The next persons to visit the spot were the representatives of the plaintiff, who were there in the following spring at about the opening of the fishing season of the spring of 1905, and at the time of their arrival nothing remained of the defendants' piles or timbers or notice to advise the plaintiff or his representatives that any prior location of a fish trap site had been made, nor did said plaintiff have any notice or knowledge of any claim ever having been made to said location by said defendants, or any or either of them. That said plaintiff, shortly after going to said location in the spring of 1905, sent one Keating, who was a surveyor and representative of plaintiff, and immediately had the upland, set out and described herein, surveyed and the boundaries marked and described as set forth in these findings; that about the time that the said Keating, who was the representative of the plaintiff, surveyed off the said ground and was running lines along the shore, a crew with a pile driver and a raft of piles for the plaintiff herein, appeared upon the tide lands and waters in front of said piece of surveyed ground, and soon thereafter the plaintiff commenced driving piles in and upon the tide lands and waters in front of said surveyed ground for a fish trap. Said plaintiff had, prior thereto, made out and filed a location notice claiming said location as a fish trap site. That after plaintiffff had driven eight piles, in a line out from the shores of said waters, and a dolphin consisting of three piles out in deep water, and had driven all the piles he had in the said raft, a watchman was left on the beach and the remainder of the men of the crew of the plaintiff left with a steamer for the purpose of getting more piles to finish said fish trap.

III.

That a short time after the crew of the plaintiff left, the defendant Leonard appeared upon the said tide lands and waters in front of the piece of land described herein, and at the spot where plaintiff was driving his fish trap, and said defendant Leonard at said time had with him a pile driver, a crew therefor, and a tow of piles. That said Leonard was notified at said time by said watchman so left upon the beach by plaintiff as aforesaid, that the tide lands and places in dispute and upon which plaintiff was constructing his fish trap, belonged to plaintiff, and the said fish trap in the course of construction was plaintiff's fish trap location, but the defendants paid no attention to the warning or notice and went to work with their said pile driver and crew and drove the piles which they had on hand in the construction of a fish trap, and the work of driving said piles by defendants was done in such manner that one of plaintiff's piles was made a part of defendants' trap, and the said defendants continued in the work of construction of their fish trap and the same was so constructed and put in as to render plaintiff's work useless and of no value whatever. That said defendants completed their fish trap shortly after the commencement of the driving of the same, and ever since said time have occupied said location and have run, operated and maintained their said fish trap upon the same, against the consent of the plaintiff, and in such manner as to render said location of no value whatsoever to the said plaintiff.

IV.

That the waters at said described place abound in fish, and particularly that species of fish known as salmon, and said location was, and is, a good and valuable location for

the purpose of extending out from the shore line of said described piece of ground herein described a fishing device known as a fish trap, which is made by driving a straight line of piles out for some distance from the shore line into deep waters; then constructing a different device at the end thereof known as a "heart," and in otherwise driving piles in a way that webbing may be hung upon said piles in such a manner as to catch a large quantity of salmon, which said fish have a great market value, and said business of fishing in said manner can profitably be carried on.

V.

The Court further finds from the evidence that the plaintiff herein exhibited diligence and good faith in the building and constructing of his fish trap, and that had it not been for the wrongful acts of the defendants herein he would have completed his trap within a reasonable time. That plaintiff at all times mentioned was a citizen of the United States of America.

VI.

That the matter in dispute in this case exceeds in value the sum of $500.00.

At the request of the defendants R. A. Leonard and the Columbia Canning Company, the Court makes the following findings:

I.

That said defendants are and were at all times mentioned in the complaint, citizens of the United States of America, and are and were for a long time prior to the filing of the complaint herein, and were and for a long time prior to the 18th day of April, 1905, engaged in the business of fishing for salmon in the waters of Lynn Canal, Alaska, by means of gill-nets, fish traps, seines and other

devices; all of which said methods or means of fishing are lawful, well known to and commonly used by fishermen in said waters; and at all of said times defendants were also engaged in the business of canning fish for the market and in said lines of business have invested and do now have invested in and about their seines, nets, traps and cannery on Lynn Canal, Alaska, a large amount of money.

II.

That there were never any persons engaged in fishing in, at or near the locality of the property in litigation prior to the beginning of this suit.

III.

That the locus of said eleven piles and the locus of said defendants' said trap is on navigable waters of the United States, to-wit, Lynn Canal.

And from the above findings of fact the Court makes the following

CONCLUSIONS OF LAW.

I.

That the acts of the defendants in attempting to locate the property in dispute as a fish trap location in the fall of the year 1904 were ephemeral and not substantial, and did not even stand to give notice of defendants' intention to take up the same as a fish trap location, and were entirely insufficient and under the circumstances and the evidence did not constitute a location at all.

II.

That the said plaintiff was in the rightful and lawful possession of said tide waters and tide lands and waters wherein he was constructing his said trap, and so having

the prior possession of the same was and is entitled to the use of said property without being molested or interfered with by the said defendants, or any or either of them, and that said plaintiff should be protected in the enjoyment of his said property and the occupancy thereof, for the uses and purposes for which he made his improvements and took up said fish trap location.

III.

The Court further concludes, that by reason of the wrongful and unlawful acts of the defendants, the plaintiff had been deprived of the possession of said fish trap location and the right to run, maintain and operate the same, and his fish trap thereon, and is entitled to the relief prayed for in his complaint.

ASSIGNMENT OF ERRORS.

Errors are assigned as follows (page 111):

1.

Said defendants demurred to the complaint on the ground that said complaint did "not state facts sufficient to constitute a cause of action or to entitle plaintiff to the relief sought or to any relief." The Court overruled said demurrer, and its action in so doing is assigned as error No. 1.

2.

Before opinion rendered or findings made, defendants requested the Court to make, from the evidence, the following finding: "XII—That on or about the 9th day of May, 1905, plaintiff drove 11 piles, as stated in the complaint, but did not connect the same with a web, nor fish with the same, or at all, at said time, or at any other time;"

but the Court refused to make such finding, to which defendants duly excepted, and this action of the Court is assigned as error No. 2.

3.

Before opinion rendered or findings made, defendants requested the Court to make, from the evidence, the following finding: "XIII—That afterwards, to-wit, on or about the 23d day of May, 1905, defendants constructed and equipped a fish trap in front of plaintiff's said eleven piles, and on or about said date commenced to fish with the said trap, and are now, and at all times since the filing of the answer herein have been, fishing at said place by means of said fish trap." But the Court declined to make said finding, to which defendants duly excepted, and this action of the Court is assigned as error No. 3.

4.

Before opinion rendered or findings made, defendants requested the Court to make, from the evidence, the following finding: "XV—That defendants are not interfering with, and are not about to interfere with, the plaintiff in the exercise of his right to fish in said place, except insofar as the defendants' said trap would cork the trap proposed to be built by the plaintiff as mentioned in the complaint herein." But the Court refused to make said finding, to which defendants duly excepted, and this action of the Court is assigned as error No. 4.

5.

The Court, in its second conclusion of law, concluded, from the facts found, that plaintiff was in prior possession of said tide waters and tide lands and entitled to protection by injunction. Defendants duly excepted, and the action of the Court in making this conclusion is assigned as error No. 5.

6.

The Court, in its third conclusion of law, concluded that plaintiff "is entitled to the relief prayed for" in his complaint. Defendants duly excepted, and said action of the Court is assigned as error No. 6.

7.

Defendants moved for a dismissal of the action, on the findings as made, for the reason that said findings show that plaintiff is not "entitled to the relief sought or to any relief." But the Court overruled this motion, to which action of the Court defendants duly excepted, and said action of the Court is assigned as error No. 7.

8.

Said decree is erroneous in this, to-wit: The facts as found show that the locus of the said 11 piles of plaintiff and the trap of defendants are in navigable waters of the United States. The facts found as to plaintiff's acts are not sufficient in law to constitute possession by plaintiff of anything except said piles and of the waters covered thereby. The facts found show that said eleven piles do not enclose anything, and that they had never been used for fishing purposes and were incapable of being so used. There is no finding of any interference by defendants or threats of interference, save insofar as the trap driven by defendants would cork the proposed trap of plaintiff. The facts as found are therefore insufficient to sustain the decree, and insufficient to sustain any decree, save one of dismissal of the action.

9.

Said decree is erroneous in this, also: That there is no finding of fact and no evidence that plaintiff would be

irreparably injured, or that he has not a plain, speedy and adequate remedy at law.

10.

Said decree is erroneous in this, also: It commands a person who is actually fishing at a place in the navigable waters of the United States, as shown by the uncontradicted evidence, to desist therefrom, in favor of one who is shown by the evidence to have been getting ready to fish therein, and the proceeding is entirely without equity.

11.

Said decree is erroneous in this, also: That the uncontradicted evidence shows that plaintiff had only started to build a fish trap; that he had placed eleven piles in the navigable waters of the United States, said piles being about ten feet apart, in a line from the shore, not enclosing anything, and being incapable of catching fish, and that while plaintiff was absent, defendants peaceably and quietly constructed and equipped a fish trap in said navigable waters, of which the effect was to cork plaintiff's proposed trap; that at the time of the trial hereof and at the date of filing the answer, defendants were fishing with said trap, and that they did not otherwise, or at any time, interfere with plaintiff in his right of fishing or with his proposed trap, or threaten to so interfere. The evidence, therefore, proves no facts warranting or justifying the decree, and if the Court had found as facts the facts which said uncontradicted evidence shows, the decree could not have lawfully been other than one of dismissal.

ERRATUM.

The word "plaintiff" on the last line of page 109 of printed record, is manifestly an error. The word should be "defendants." The context shows this, the words "as above set forth" fully explaining.

POINTS, ARGUMENT AND AUTHORITIES.

The first assignment attacks the sufficiency of the complaint, and the fifth, sixth, *seventh*, eighth, ninth and tenth assignments attack the sufficiency of the findings to support the decree, or any decree except one for dismissal of the complaint. [The complaint is found on page 2; the demurrer to complaint on page 13; the order overruling demurrer on page 13; *the motion for judgment on the findings on page* 105; the exceptions to conclusions of law and refusal to make requested findings on page 106, the decree on page ——, and the overruling of motion for judgment on the findings at page 106 (top) of the printed record.]

All these assignments are intimately connected and will be discussed together.

The complaint alleges and findings show that while appellee (plaintiff) was simply getting ready to fish in the navigable waters of the United States, appellants (defendants) got their trap into operation and actually began fishing and were actually fishing; that the only interference found by the Court was that appellants' trap would prevent appellee from catching any fish in his trap should the latter be built as contemplated, by reason of being in front of the latter, or, in fisherman's lingo, "corking" it. No "direct" interference is complained of in the complaint or shown by the evidence or found by the Court, only this "anticipation" by being the first obstruction which the fish encounter in their run from south to north.

The only citation of authority made by the learned trial Judge to support the decision by him rendered is in his opinion at page 97 (bottom) of the record, as follows:

"Where labor is necessary to fit a place for profitable fishing, the one bestowing that labor is entitled to protection as long as he continues in possession and occupation."

2 *Farnham on Waters and Water Rights,* Sec. 394.

"As long as he continues in possession and occupation." The effect of these words is, in the opinion, sought to be overcome by the consideration that "every man is entitled to a reasonable time in which to complete his fish trap, where he exhibits diligence and good faith." (Opinion, page 97, middle.) But, we submit that diligence and good faith have nothing to do with the case, for if there be one enterprise in life where the only diligence or good faith which counts is that diligence and good faith which succeeds, that enterprise is the one of fishing—especially in the navigable waters of the United States.

Eight piles in a row, ten feet apart, no webbing, no netting, enclose nothing, possess nothing, except the eight small areas of water or land covered by those piles. We quote from 2 Farnham on Waters and Water Rights:

Section 394 (the precise section cited by the learned trial Court)—"No person can acquire a right of fishery superior to any other person unless he has gone into the common waters and set up and established his pounds and stakes and taken possession of the line which those pounds and stakes include, and with which a stranger cannot directly interfere."

Now, in the case at bar the appellee had not set up any "pounds or stakes;" he had not "taken possession of the line which those pounds and stakes include," and besides appellants were not "directly" interfering, and were not interfering at all, except in so far as their trap caught fish and appellee's trap, if built, would not have been able to catch fish. In making the

above citation the learned Court seems to attach no significance to the word "directly," for he omits it entirely. Is there not a world of meaning in that word "directly?"

It is true that in the third finding occurs the following: "And the work of driving said piles by the defendants was done in such a manner that one of plaintiff's piles was made a part of defendants' trap." But, even if so, the value of that pile or its use and occupation could be recovered in an action at law, under the proper allegations. Besides, the use of that one pile is not the interference complained of—it is not even mentioned in the pleadings—it appears to have been an afterthought.

In citing the above mentioned authority, the learned trial Court apparently overlooks all that part of the section except the small excerpt cited in the opinion. What of this language:

"The Court was of the opinion that no damages could be recovered in case such stranger established his line clear around that first established and thereby impaired its usefulness. * * * But if the possession is such as not to be exclusive, the one making the clearing has no ground upon which he can exclude the public, and a custom among fishermen to recognize each other's rights is void for uncertainty and unreasonableness" *(supra);* and again, same section, *supra:*

"Therefore, the right to use a fishery at the proper time depends upon priority of possession, and lasts only so long as the possession is maintained."

The learned trial Court applied that principle of law to the case at bar as if the word "possession" referred to the possession of the piles and dolphin, and not to possession of the fishery. How much of the sea would these eight piles "possess?" If eight piles "possess" all the sea from Juneau to Skagway, why may not seven piles, or six, or even one suffice? Surely, plaintiff cannot, by

stationing a man on the beach to warn people not to fish, pre-empt the waters of the ocean!

In Pacific Steam Whaling Company vs. Alaska Packers Association, 72 P. R. 161, the following instruction to a jury was approved by the Supreme Court of California:

"In its very nature, the exercise of the right of fishing in the public waters of the ocean is not, and cannot be, exclusive. Its exercise, no matter by whom or for what length of time, is only the exercise of a public right. There can be no possession, for the purpose of fishery, of an area of land covered by the waters of the ocean that is at all analogous to an actual possession of a tract of upland which might give the possessor a right of action against a mere trespasser. One who exercises this public right of fishery in the sea does not by that act make himself a trespasser." This is a good case on public right of fishery.

See also

20 L. R. A. 94.
Westfall v. Van Auker, 12 Johnson 425.
Freary vs. Cooke, 14 Mass. 488.
Collins vs. Benbury, 2 Am. Dec. 155.
Young vs. Hotchkiss, 6 Q. B. 606.

The owner of a weir has at common law no right of action against the erection of a weir lower down which prevents him from catching as many fish as he might otherwise have caught.

Chency vs. Gutpill, 2 Hannay 379 (N. B.).

"No action lies for anticipating another in taking fish."

Am. & Eng. Ency. Law, 2nd Edition, Vol. 13, page 585, note.

"Exclusive right is not acquired by clearing out a fishing place. Even a custom for years will not suffice."

15th Mass. 488.
29 Am. Dec. 561.

For general discussion of fishing rights, see

14 L. R. A. 386.
42 L. R. A. 311.
20 L. R. A. 94.
56 L. R. A. 495.

It is not denied that many cases can be found where an injunction has been granted to prevent the "corking" of a trap or weir, but we think it will be found upon examination that such action is founded upon statute, or that the complainant had a license from the sovereignty—something in the nature of a franchise to be protected in equity. Here no such thing is claimed or shown.

"An injunction will not be granted to a party unless he has a clear, legal or equitable right, which is being about to be invaded."

1st *Beach on Injunctions.*
2nd *Beach, Equity Jurisprudence,* Sec. 643.

This has become solely an application for a mandatory injunction, an ejectment to oust appellants from possession and to turn that possession over to appellee. Appellants were within their rights when they refused to desist merely because there was served on them notice that plaintiff would apply for an injunction. (Record, p. 81.)

1st *Beach on Injunctions,* Sec. 47.

This leaves remaining the second, third, fourth and eleventh assignments of error to be considered.

Second Assignment (Record, p. 111)—This assignment complains of the refusal of the Court to make Finding No. XII, requested by appellants, which said requested finding was as follows:

"That on or about the 9th day of May, 1905, plaintiff drove eleven piles, as stated in the complaint, but did not connect the same with a web nor fit the same for fishing, nor fish with the same, nor at all, at said time or at any other time." (Record, p. 88.)

This finding should have been made. The evidence establishes the truth of the facts stated, and there was absoltuely no evidence to the contrary. (Rapp's testimony, pages 33 and 38, and Leonard's testimony, page 63, bottom.)

Third Assignment (Record, page 112)—This assignment complains of the refusal of the Court to make Finding No. XIII, requested by appellants, which said requested finding was as follows:

"XIII—That afterwards, to-wit, on or about the 23d day of May, 1905, defendants constructed and equipped a fish trap in front of plaintiff's said eleven piles, and on or about said date commenced to fish with the said trap, and are now, and at all times since the filing of the answer herein have been, fishing at said place by means of said fish trap." But the Court declined to make said finding, to which defendants duly excepted, and this action of the Court is assigned as error No. 3. (Record, p. 112.)

The finding requested should have been made. The evidence of its truth was clear and uncontradicted. (See Leonard's testimony, Record, page 63.)

Fourth Assignment—This assignment complains of the refusal of the Court to make Finding No. XV, requested by appellants, which said requested finding was as follows:

"XV—That defendants are not interfering with, and are not about to interfere with, and they have never interfered with, the plaintiff in the exercise of his right to fish in said place, except insofar as the defendants' said trap

would cork the trap proposed to be built by the plaintiff as mentioned in the complaint herein." (Record, p. 112.)

This finding should have been made. No other interference or attemtped interference is shown. As a matter of fact, the Court did not find that there was any other interference, and we suppose it may be taken that the finding requested has been substantially made by the failure to find any other interference.

Eleventh Assignment—This assignment attacks the decree, appellants' contention being that the evidence will not support the decree, and that if the Court had found as facts the facts which the clear and uncontradicted evidence establishes, there could have been no other decree than one of dismissal; but appellants also contend that even on the facts found the decree should have been for dismissal.

Respectfully submitted,

R. W. JENNINGS,
Attorney for Defendants.

Owing to an oversight of the drafts-man who prepares the tracing of appellant's Exhibit No.2 which appears as page 80 of the printed record,the exact locationof appellee's eight piles and dolphin and of appellant's trap is not clearly shown :For that reason,the origiaal Exhibit No.2 has been transmitted to(and is now on file with) the Clerk of this Court,in accordance with Rule 14,Sub.4,Rules of this Court.

Attention is invited to the small dots in the upper left hand corner of the exhibit,oppo site Grand Reef Mining Claim,as repre-senting appellee's eight piles and to Leonard's explanation of said exhibit to be f found at top of page 63 of record.